National Energy Board | Office national de l'énergie

Reasons for Decision

Robert and Donna Siebert – Alliance Pipeline Ltd.

MH-R-1-2007

October 2007

Land Reclamation

Canada

National Energy Board

Reasons for Decision

In the Matter of

Robert and Donna Siebert – Alliance Pipeline Ltd.

Land Reclamation – Alliance Pipeline Ltd.
Spirit River Lateral within NW 33-73-8 W6M
and SE 32-73-8 W6M

MH-R-1-2007

October 2007

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Abbreviations

ADR	Appropriate Dispute Resolution
Alliance	Alliance Pipeline Ltd.
Board or NEB	National Energy Board
NW 33	Northwest Quarter of Section 33, Township 73, Range 8 West of the 6 Meridian
Post Hearing Agreement	Alliance letter to the NEB dated 17 August 2007
ROW	Right of Way
SE 32	Southeast Quarter of Section 32, Township 73, Range 8 West of the 6 Meridian
Siebert Properties	SE 32-73-8-W6M (SE 32) and NW 33-73-8 W6M (NW 33)
Sieberts	Robert and Donna Siebert
TransCanada	TransCanada PipeLines Ltd.

Recital and Appearances

IN THE MATTER OF the National Energy Board Act (NEB Act) and the Regulations made thereunder;

AND IN THE MATTER OF the Alliance Pipeline Ltd. (Alliance) Spirit River Lateral within NW 33-73-8 W6M and SE 32-73-8 W6M owned by Robert and Donna Siebert (Sieberts);

AND IN THE MATTER OF Hearing Order MH-R-1-2007

HEARD in Clairmont, Alberta 26 and 27 June 2007.

BEFORE:

K.M. Bateman	Presiding Member
G. Habib	Member
S. Crowfoot	Member

APPEARANCES:

S. Thomas G. Bowker, QC	Robert and Donna Siebert
L.H. Olthafer L. Estep	Alliance Pipeline Ltd.
M.A. Fowke K. Lozynsky	National Energy Board

Chapter 1

Introduction

1.1 Background

Alliance Pipeline Ltd. (Alliance) constructed the Spirit River Lateral (the Pipeline) across SE 32-73-8 W6M (SE 32) and NW 33-73-8 W6M (NW 33) (collectively the Siebert Properties) owned by Robert and Donna Siebert in 2000 as part of the Alliance Pipeline. Figure 1 is a map of the Pipeline in relation to the Siebert Properties. Since construction, Alliance has performed some reclamation and remedial work on the right of way (ROW) and adjacent areas on the Siebert Properties. Outstanding reclamation and compensation issues have been the subject of ongoing consultations and negotiations between the parties. One of the central outstanding issues is the spread and responsibility for control of Scentless Chamomile, a noxious weed pursuant to Alberta's *Weed Control Act*[1].

Board staff carried out inspections of the Siebert Properties in 2003, 2004, and 2005. During these inspections, the Sieberts raised the need for the reclamation, including control of Scentless Chamomile on their properties as a result, in their view, of Alliance's activities. A number of meetings and facilitated discussions followed. In March and October 2005, Board staff asked informal information requests of each party and asked whether Board involvement was required to assist in resolving the weed control issue. Alliance indicated that Board involvement was not required, whereas the Sieberts indicated that it was.

On 19 May 2006 the Board issued a decision regarding reclamation and monitoring with respect to the Bear River Crossing and control of Scentless Chamomile on the Siebert Properties. In terms of final reclamation, the Board:

1. Required Alliance to contract an environmental specialist to file an inspection report and to file a proposed final reclamation plan addressing the Bear River Crossing, both by 15 June 2006. The plan was also to address erosion and loss of vegetation on the adjacent TransCanada PipeLines Ltd (TransCanada) ROW. The Board expected Alliance to complete its final reclamation by 30 November 2006 and to file a monitoring report by year's end. Further, it directed Alliance to file additional year end monitoring reports for 2007 and 2008.

2. Established a noxious weed control plan and ordered Alliance to implement it both on and off the ROW. The reclamation plan required Alliance to monitor the Siebert Properties every four weeks and spot spray any recurring sites of Scentless Chamomile as well as hand pick, bag and dispose of the weeds that survived the herbicide application. The monitoring and implementation of the weed control plan was to include adjacent quarter sections to facilitate the control of the noxious weed. The Board further ordered

1 *Weed Control Act*, RSA 2000, c. W-5. Schedule 1 of the *Weed Regulation*, Alta. Reg. 171/2001 designates Scentless Chamomile as a noxious weed.

Alliance to provide fencing materials to construct an elk fence should it become necessary to relocate the elk herd in order to facilitate noxious weed control.

On 15 June 2006 Alliance filed an Environmental Inspection and Reclamation Plan noting that it had several fundamental concerns with the direction made by the Board and provided the plan without prejudice to its application for review of the Board's decision, which it indicated would follow.

1.2 Jurisdictional Review

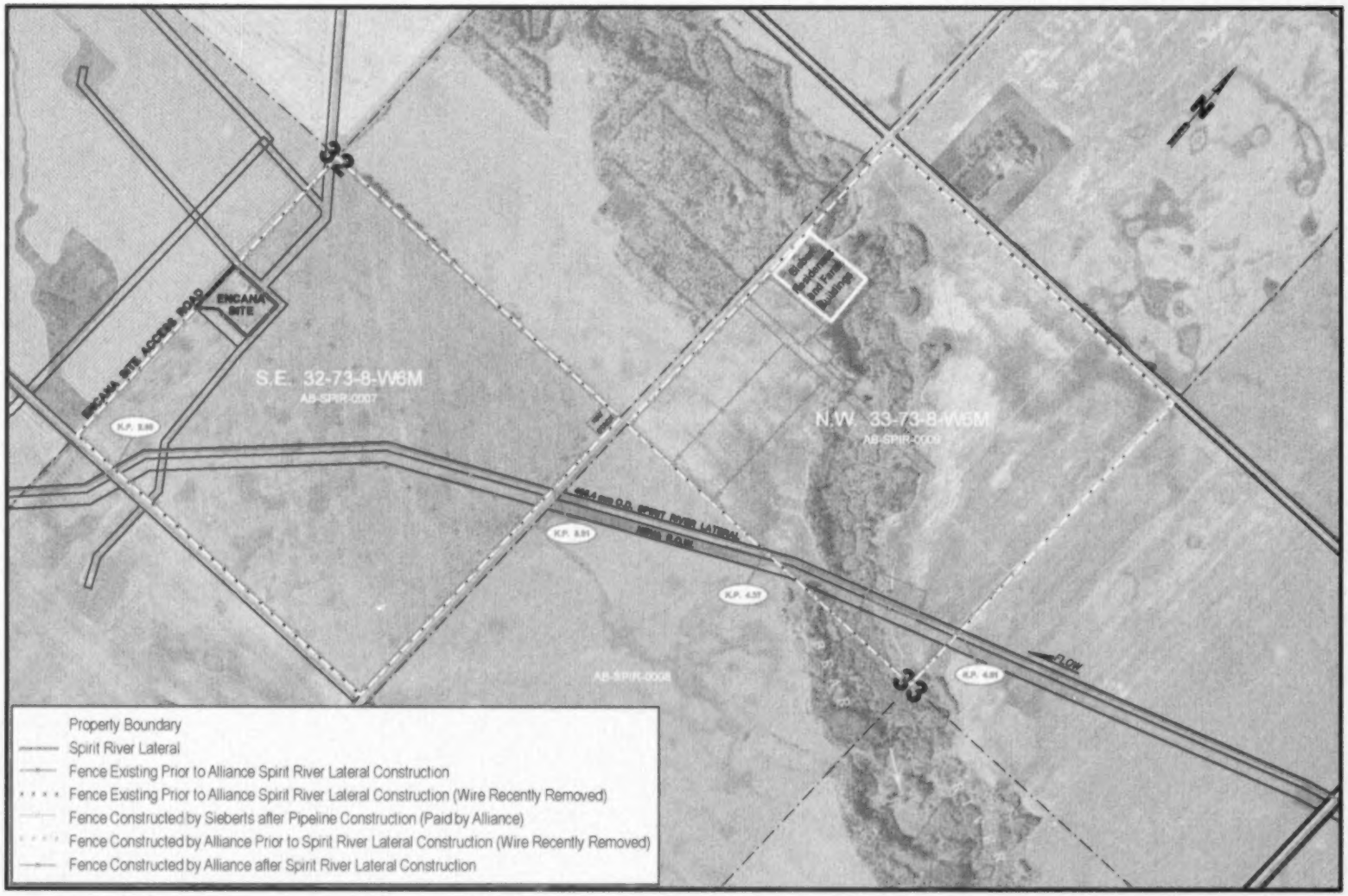
On 20 June 2006, Alliance filed an application, pursuant to section 21 of the *National Energy Board Act*, for review of the Board's 19 May 2006 decision, which ordered remediation activities off of Alliance's ROW. After receiving comments from the Sieberts and Alliance, the Board granted the review application on 15 September 2006 on the basis that the Board was of the view that the process leading to the decision may not have been fair to Alliance in that notice may not have been adequately provided to indicate that a decision of the Board was contemplated. In parallel to the Board process, Alliance also sought leave to appeal the Decision; the Federal Court of Appeal granted leave to appeal on 26 August 2006. The appeal was discontinued 19 April 2007.

The Board conducted a staged review of its decision and initially solicited comments regarding the Board's statutory authority to order reclamation and weed control activities on the Sieberts' property outside of the ROW In a letter dated 20 March 2007, after considering the submissions from both parties, the Board determined that it has the jurisdiction to require Alliance to conduct reclamation and weed control activities on the Siebert Properties outside of the ROW or temporary workspace of Alliance, so long as the reclamation is for damage caused by Alliance. The Board determined an oral hearing was necessary to consider what reclamation issues were still in dispute, the cause of the damage, including the introduction and spread of Scentless Chamomile, and any necessary remediation. The Board declined to make a decision regarding whether it has the jurisdiction to allow the Sieberts to determine if a fence is required to deal with the reclamation issues given its decision to hold a hearing on matters relating to the damage and reclamation of the lands. A copy of the Board's 20 March 2007 letter is provided in Appendix I.

1.3 Hearing into Causation of Damage and Reclamation

The Board issued Hearing Order MH-R-1-2007 on 16 April 2007, which included the process for the submission of evidence leading up to the oral Hearing and set out the issues to be considered in the hearing. The list of issues in MH-R-1-2007 included: the reclamation issues in dispute; the cause of the damage to the land; and the remediation that needs to be done and who should be responsible for doing it.

Figure 1-1
Siebert Properties


ENCANA SITE ACCESS ROAD
ENCANA SITE
S.E. 32-73-8-W6M
AB-SPIR-0007
N.W. 33-73-8-W6M
AB-SPIR-0008
AB-SPIR-0006
32
33
K.P. 3.91
K.P. 4.37
K.P. 4.81
FLOW
Property Boundary
Spirit River Lateral
Fence Existing Prior to Alliance Spirit River Lateral Construction
Fence Existing Prior to Alliance Spirit River Lateral Construction (Wire Recently Removed)
Fence Constructed by Sieberts after Pipeline Construction (Paid by Alliance)
Fence Constructed by Alliance Prior to Spirit River Lateral Construction (Wire Recently Removed)
Fence Constructed by Alliance after Spirit River Lateral Construction

In their evidence and in response to information requests from the Board, the Sieberts stated that the outstanding reclamation issues which needed to be addressed were:

1. The infestation of Scentless Chamomile on the Siebert Properties;

2. Removal of a fence along the Alliance ROW at the top of the creek bank;

3. The location and presence of oversized rocks placed by Alliance at the Bear River crossing to address slope instability; and

4. Poor re-establishment of vegetation along the Alliance ROW.

To assist in better understanding the evidence before it, the Board conducted a site visit of the Siebert Properties and the pipeline ROW on 25 June 2007 in the presence of the parties. The Board found the site visit very useful given the site specific nature of the matters before it in this case. The oral hearing was held in Clairmont, Alberta on the 26 and 27 of June 2007.

Before the close of the hearing, the Board asked the parties if they would be willing to meet with each other, prior to the Board making its decision, in an attempt to come to an agreement on the issues. Parties met on 13 August 2007, and on 17 August 2007 Alliance filed a letter with the Board documenting the partial agreement reached between the parties with respect to the issues before the Board (Post-Hearing Agreement). On 20 August 2007 the Sieberts filed a letter confirming the accuracy of Alliance's 17 August 2007 letter in terms of the resolved issues. Both Alliance and the Sieberts requested that the Board issue a decision with respect to the remaining issues in dispute. In subsequent communications from Alliance and the Sieberts, dated 24 August 2007 and 27 August 2007, respectively, the parties stated that the remaining unresolved issue was limited to the control of Scentless Chamomile off of the ROW.

Chapter 2

Introduction and Control of Scentless Chamomile and Re-establishment of Vegetation on Alliance Easements

2.1 Background

Scentless Chamomile, also known as mayweed or daisy, is a noxious weed under Alberta's *Weed Control Act*. Scentless Chamomile spreads quickly along roadsides and fence lines and reduces yields in hay fields, pastures, cropland, and disturbed land. This weed is of primary concern in hay land and pasture where control options are limited and there is little competition from slow establishing forage. Scentless Chamomile is an annual, biennial or short-lived perennial that reproduces by seed. Scentless Chamomile flowers from May to October and a single plant can produce a million seeds.

2.2 Position of the Sieberts

The Sieberts stated that they had not noted the presence of Scentless Chamomile on their Properties prior to 2002. They submitted that the weed was first observed on Alliance's ROW in the summer of 2002 on NW 33 and that the first observed occurrence on SE 32 was also on the Alliance ROW. They indicated that Scentless Chamomile then spread off the ROW onto other locations on SE 32 and NW 33.

The Sieberts provided evidence indicating that SE 32 was used for the production of certified seed and therefore was certified to be weed free in 1997. In 1998, the Sieberts changed their farming practices from mixed farming to elk and bison ranching. They acknowledged that the years following pipeline construction[2] were characterized by drought conditions and that the vegetation on said properties was stressed.

The Sieberts stated that they observed machinery arriving on their properties covered in mud during the original pipeline construction. The Sieberts also recounted observing the importation of topsoil onto NW 33, east and west of the Bear River Crossing, and SE 32, along the ROW at the same locations where the Sieberts first observed Scentless Chamomile. It was suggested by the Sieberts that the source of Scentless Chamomile could have been the Alliance equipment and seeds within the mud which covered the equipment or the topsoil imported from Grande Prairie used on both quarter sections. The Sieberts stated that the source of the Scentless Chamomile could not have been their livestock or feed as new livestock was always quarantined, no Scentless Chamomile was found in the quarantine pens, and all the feed used on the Siebert Properties was from land that was free of Scentless Chamomile.

2 Construction of the Spirit River Lateral across the Siebert Properties was undertaken in 2000.

In the Sieberts' view, a hand picking program has not been sufficient to control and eradicate Scentless Chamomile. In 2005 they sprayed the southern part of SE 32, as it had the highest degree of Scentless Chamomile infestation and, in their view, this approach was successful. In 2006, the Sieberts found only one plant on the lands sprayed.

The Sieberts submitted that a multi-pronged approach is required to gain control and eradicate the weed infestation and that this long-term management plan would combine hand picking of the weeds, broadcasted herbicide application, seeding with certified seed, and establishment of competitive crop, forage or grass. According to the Sieberts, this would require the relocation of the elk off of NW 33. They expressed the view that Alliance should build a fence, meeting the specifications required to contain elk [3] on a neighbouring property (SW-33-73-8 W6M) to enable the relocation. The Sieberts have sold the bison, which were on SE 32, and have plans to establish a cereal crop. The Sieberts have requested that Alliance: spray both quarter sections in their entirety; reseed, fertilize and harrow to ensure good grass coverage on NW 33; and spot spray and hand pick both quarter sections for a period of five to seven years.

The Sieberts expressed the view that the poor re-establishment of vegetation on Alliance easements is closely linked to the Scentless Chamomile infestation and that both of these issues can be addressed in concert. At the time of the hearing, the Sieberts acknowledged that the Scentless Chamomile infestation is largely under control on both quarter sections.

2.3 Position of Alliance

Alliance stated that it became aware of the presence of Scentless Chamomile on SE 32 and NW 33 ROW on 9 August 2002 and 5 September 2002, respectively, and started a hand picking program shortly thereafter. It stated that it considers the weed control method of hand picking Scentless Chamomile on both quarter sections to be relatively effective.

Alliance stated that equipment used on the Pipeline was washed in Grande Prairie prior to being mobilized to the kick-off location for the Spirit River Lateral and inspected for cleanliness according to Alliance's equipment washing procedures. If there were locations of known weed infestation along a particular spread, intermediate weed wash stations were established before the machinery was brought onto adjacent properties along the ROW. As there were no weed infestations observed on the Spirit River Lateral, no intermediate stations were established.

In contrast to the Sieberts' evidence regarding topsoil location, according to Alliance's records the only topsoil imported was used for repairs on the east bank of the Bear River crossing on NW 33 in October 2001. Alliance submitted that *in-situ* topsoil work was conducted on SE 32 in September 2003. Alliance also stated that its standard practice is to inspect the source of topsoil to ensure that it is weed free. Although Alliance stated that it should have records regarding the sourcing and testing information for this topsoil, it could not locate them.

It was suggested by Alliance that the Scentless Chamomile infestation could have originated from a number of other sources, including new livestock, feed importation, and other operators

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3 According to the Sieberts, fencing for elk is required to use page wire with poles at 20 foot spacing and a fence height of 8 feet.

on the Siebert Properties (e.g., EnCana site). Alliance also stated that the Sieberts' pastures were overgrazed, and that this, compounded by several years of drought, overstressed the land which created an ideal environment for Scentless Chamomile infestation.

Alliance stated that pre-construction weed surveys were not completed on NW 33 or SE 32 but that both the vegetation and soils pre-construction surveys that were conducted would have identified weed infestations that would be prone to being transported along the pipeline ROW during construction. It was acknowledged by Alliance that, after construction of Spread I, there were nine tracts with Scentless Chamomile infestations and only one of those tracts had pre-existing issues with Scentless Chamomile. Alliance also stated that to produce a large infestation, there must be a lot of seeds brought in at one time, or else the plant has to be there for a number of years.

Alliance expressed the view that its weed control method of hand picking Scentless Chamomile was relatively effective on the Siebert Properties. However, at the time of the hearing Alliance acknowledged that spot spraying was one of the activities that can also form part of an overall program. Alliance's vegetation management expert (Mr. Plain) stated that it would be appropriate to use a selective herbicide to control the plant.

Alliance stated that the Scentless Chamomile infestation was largely under control on both quarter sections and that on NW 33, monitoring, hand spraying and hand picking combined with rotational grazing would be the appropriate course of action for ongoing Scentless Chamomile control. With respect to SE 32, Alliance was of the view that the Scentless Chamomile problem is largely under control as a result of Alliance's efforts and the recent herbicide application by the Sieberts and that ongoing control will be easily achieved with the proposed change of land use from pasture to cereal crop.

Alliance stated that the standard of proof in this matter is the balance of probabilities, which it characterized as requiring the decision-maker to be more convinced of the existence of a fact than not. According to Alliance, there must be a preponderance of evidence that events unfolded as claimed. It argued that the standard of proof is higher when the implications of a decision are more serious and suggested that the remedies the Sieberts were requesting were financially significant. In Alliance's view, the Sieberts had not discharged their burden of proof in respect of the issue of causation or the type of relief requested. Further, Alliance argued that the evidence was insufficient to draw a correlation between the activities of Alliance and the Scentless Chamomile infestation.

2.4 Post Hearing Agreement

The Post Hearing Agreement provides that Alliance will continue to monitor and control Scentless Chamomile on the ROW on both SE 32 and NW 33. Alliance will visually inspect the ROW during regular aerial patrols and will also rely on the Sieberts to monitor on and off the ROW and advise Alliance of any issues. The Scentless Chamomile will be controlled through handpicking and spot spraying the Scentless Chamomile where appropriate.

With regard to the status of vegetation along the ROW, the Post Hearing Agreement states that Alliance will hand seed the elk erosion trails (bare ground) along the TransCanada ROW and the

area within the exclusion fence at the Bear River crossing. Alliance will make its best effort to complete the hand seeding by the end of August 2007 and will perform the work only once. The Sieberts' acknowledged and accepted any risk to the seed establishment that use of the area by their livestock may pose.

Views of the Board

The burden of proof refers to the responsibility to adduce evidence to support an assertion put forward in a proceeding and to persuade the decision-maker of the truth of that assertion. The Board's approach to the burden of proof was the subject of discussion in both the GH-2-87 Decision[4] and the RH-R-2-2005 Decision[5]. The burden of proof lies with the applicant and, if an applicant is unable to satisfy the burden, the particular relief will be denied. The ultimate burden of proof on an issue, which remains with the applicant, must be distinguished from the shifting evidentiary burden that occurs during the course of adducing evidence and argument on an issue. Accordingly, once the applicant establishes a *prima facie* case, an intervenor is properly assigned the evidentiary burden to show flaws in the applicant's case or to suggest alternative possibilities, either of which could result in the burden of proof on the applicant not being met. Should the intervenor be successful in meeting this evidentiary burden, the evidentiary burden would shift back to the applicant to re-establish that the burden of proof has been met.

In considering how the Scentless Chamomile could have been introduced on the Siebert Properties, the Board had particular regard to the following matters: the fact that SE 32 was used for certified seed production and that Alliance's pre-construction survey did not indicate any Scentless Chamomile issues on the Siebert Properties, which suggests that the two quarter sections were likely free of Scentless Chamomile prior to Alliance's construction in 2000; Scentless Chamomile was identified on the Siebert Properties only after Alliance commenced its activities on those properties; both Alliance and the Sieberts first identified Scentless Chamomile on the Alliance ROW; the Scentless Chamomile was found on two non-contiguous quarter sections during the same time period (August/September 2002); and Alliance has found Scentless Chamomile along Spread I in places where it was not identified prior to Alliance's activities on those lands.

The Board is of the view that it is more likely that the Scentless Chamomile was introduced on the Siebert Properties through Alliance's activities than through the alternative potential sources Alliance identified.

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4 TransCanada PipeLines Limited, Application for Facilities and Approval of Toll Methodology and Related Tariff Matters, decision dated July 1988

5 Coral Energy Canada Inc. and the Cogenerators Alliance, Review of RH-2-2004 Phase I Decision, decision dated May 2005

For example, the Board is of the view that it is unlikely that Scentless Chamomile came from the EnCana site as the Scentless Chamomile emerged on both SE 32 and NW 33 in roughly the same time frame. Further, the Board accepts the Sieberts' evidence regarding their livestock and feed practices, and concludes that that Scentless Chamomile was not introduced by the Sieberts' activities.

The Board notes the conflict between the recollections of the parties with respect to the timing and location of post-construction topsoil placement and that neither party has submitted evidence that is determinative of the matter. Therefore, having reviewed all of the evidence with respect to the issue of causation the Board is of the view that the Applicants have satisfied the burden of proof and finds that the Scentless Chamomile infestation was more likely caused by Alliance's activities on the Siebert Properties.

The Board is also of the view that the soil conditions and the lack of a competitive crop were contributing factors in the spread of the infestation; however, the Board recognizes that when constructing pipelines, companies must accept the land as is and adopt management and mitigation strategies based on the conditions that exist.

The Board notes that both parties agreed that the land has improved and that currently the infestation is largely under control. The Board recognizes that Alliance has expended extensive efforts on the Siebert Properties, particularly with respect to NW 33. The Board also recognizes the efforts by the Sieberts, especially with respect to the spraying of SE 32. The Board further recognizes that the actions taken on SE 32 have been largely successful in controlling the Scentless Chamomile in the area sprayed. Given the previous extent of Scentless Chamomile on SE 32, the Board is of the view that broadcast spraying was appropriate and necessary under the circumstances at the time, and notes that this was performed by the Sieberts, at their expense.

The Board notes the agreement reached between the parties in which both parties will share the responsibility for monitoring for Scentless Chamomile and Alliance will spot spray and hand pick noxious weeds as need arises on its ROW. Given the Board's determination with respect to the cause of the Scentless Chamomile infestation and taking into consideration the fact that the Scentless Chamomile is currently largely under control and should be adequately managed through sound land management practices, the Board has determined that Alliance shall be responsible for monitoring, hand picking and spot spraying the Scentless Chamomile it is aware of on the Siebert Properties through its monitoring or when notified by the Sieberts. The Sieberts are responsible to monitor the land on and off ROW and notify Alliance if any Scentless Chamomile is found. Further, the Board expects that the Sieberts will continue to

follow sound land management practices, which would include: allowing for the establishment of a competitive crop; proper rotational grazing; and applying appropriate practices for the control and eradication of noxious weeds in order to mitigate the presence of Scentless Chamomile. The Board is of the view that, if both parties cooperate in the above manner, there will be no need for broadcast spraying. Further, with respect to NW 33, the proposed relocation of the elk is not necessary for the purpose of controlling and eradicating Scentless Chamomile.

The Board's decision is predicated on its findings of causation, determinations of monitoring by both parties, hand picking and spraying by Alliance, and expectation of continued sound land management practices to mitigate the problem. Based on the evidence of the experts at the hearing, so long as both parties perform these responsibilities with diligence, the Board is of the view that the Scentless Chamomile should be controlled. In the event that one of the parties fails to continue to take adequate mitigation steps, including those mentioned above, to control the presence of Scentless Chamomile the other party could proceed with an application to the Board for variation of this decision.

Chapter 3

Removal of Fencing Materials

3.1 Background

In August 2003, during an aerial inspection of the Pipeline crossing of the Bear River within NW 33, Alliance observed an erosion feature on the northeast slope of the crossing. Erosion control work to stabilize the slope was completed in October 2003 and consisted of the installation of sandstone riprap along the north bank of the Bear River, regrading of the slope and installation of a culvert to drain water from the top of the slope. Once the remediation work and the slope reconstruction were completed, elk fencing was installed around the disturbed area to allow for regrowth of vegetation on the slope and near slope areas by preventing access for grazing elk (exclusion fence).

In September 2006, Mr. Stevenson, a restoration specialist hired by Alliance, conducted an inspection for the purpose of assessing the range health and to determine whether the fenced area had become sufficiently stabilized and vegetated to allow the exclusion fence to be removed and for the area to become available again for pasturing the Sieberts' elk. Mr. Stevenson issued his report and recommendations to Alliance in May 2007.

3.2 Position of the Sieberts

The Sieberts stated that they had expected that the fence would be removed in the summer of 2006. While the Sieberts asked Alliance an information request in this proceeding as to the timing for the removal of the exclusion fence and the responsibility for the associated costs, they had not had any discussions with Alliance between the fall of 2006 and the oral hearing regarding the removal of the exclusion fence. The Sieberts stated that they had just recently received Mr. Stevenson's report from Alliance.

The Sieberts felt that the grass had become firmly established within the exclusion area and understood that the fence removal would depend on Alliance's assessment of a new slide located to the north of the exclusion fence and the assessment of sunken portions along the pipe which were referenced in Mr. Stevenson's report. The Sieberts acknowledged that they were not sure what such an assessment entails and recognized that all discussions in relation to the exclusion fence would have to include consideration of the new slope instability.

The Sieberts stated that they had hoped to build a cabin along the river bank and that they desired to have the fence removed and the land returned to the way it was before.

3.3 Position of Alliance

Alliance stated that it had hoped to remove the fence in 2006; however, in the fall of 2006, it decided to leave the fence in place for the winter of 2006-2007 to increase the thatch in the exclusion area. Alliance's submission was consistent with Mr. Stevenson's recommendation to

leave the fencing in place for the winter of 2006-2007 to allow for the further recruitment of litter to the pasture surface, to allow existing vegetation and litter to capture available moisture during the spring of 2007 and to revisit the area during the 2007 growing season to assess whether the exclusion fence should be removed at that time.

Alliance stated that Mr. Stevenson's recommendations had not yet been discussed with the Sieberts. Alliance noted that since the 29 September 2006 survey, further erosion had occurred on the Bear River bank upstream of the Alliance right-of-way. However, based on what it had observed during the site visit on 25 June 2007, Alliance stated that the area outside of the exclusion fence looked a lot better than it did in 2006 and indicated that it would re-evaluate the situation as to whether it is a good time to remove the fence. Alliance indicated that it is not expecting to do any work on the new erosion feature located north of the exclusion site as, in its view, it is unrelated to its activities.

It was suggested by Alliance that it and the Sieberts work collaboratively in 2007 to develop a fencing and grazing strategy to maximize the likelihood of reclamation success and that, based on the results of a site assessment, a decision should be made in the spring or early summer of 2007 as to whether the exclusion fence should be removed, and whether partial or complete access should be given to the area for elk grazing. Alliance also suggested that Alliance and the Sieberts should jointly evaluate the benefits of removing the fencing and how overgrazing of the area might be prevented.

3.4 Post Hearing Agreement

The Post Hearing Agreement states that, at the request of the Sieberts, the fence wire forming the exclusion area had been removed and that the Sieberts had also requested the immediate removal of the posts. The Agreement provides that the fence post holes would be filled and compacted with soil that would be provided free of charge by the Sieberts and that the post hole areas would be hand seeded. According to the Agreement, Alliance is to make its best effort to have this completed by the end of August 2007, provided the Sieberts make the soil available in a timely manner. Upon removal, the exclusion fencing materials and posts are to become the property of the Sieberts and the Sieberts are to take responsibility for any potential overgrazing activity that may occur after their animals are reintroduced to the exclusion area.

Views of the Board

Through their negotiations, the parties reached an agreement on the removal of the fencing materials, therefore no Board determination is required with respect to this issue.

Chapter 4

Exposure of Rock Materials at the Bear River Crossing

4.1 Background

As discussed in section 3.1, erosion control work, consisting of the installation of sandstone riprap along the north bank of the Bear River, regrading of the slope and installation of a culvert to drain water from the top of the slope took place in October 2003. Eight large boulders measuring a minimum of 1500 mm diameter were placed at the outlet of the drainage pipe to reduce channel scour and erosion. Additional work at the Bear River Crossing, which involved repairs to the drainage pipe and placement of topsoil and a gravel cap over the riprap and revegetation of the work site, was completed in the fall of 2004. Additional gravel and topsoil were placed over the exposed riprap and it was reseeded in 2005 after spring floods washed the earlier placed topsoil and gravel cap away and exposed the riprap.

4.2 Position of the Sieberts

The Sieberts submitted that some oversized boulders are exposed on the riprap surface or protrude from the creek bed at the outlet of the Alliance drainage pipe and that these rocks pose a hazard to the Sieberts' livestock. They stated that the elk followed the fence line at the Bear River Crossing and therefore walk over the riprap. The elk also run along the river channel, particularly during breeding season. The Sieberts claimed that two of their elk have broken legs and a third has become lame and they believe the riprap may have contributed to the injuries.

It was acknowledged by the Sieberts that removal of the fence at the Bear River crossing could partially reduce the hazard to their elk as the elk would no longer follow the fence line over the riprap. They submitted that methods to restrict elk access to the riprap would not be effective and they would prefer that the large rocks either be diminished in size or removed. However, the Sieberts acknowledged that they are unaware of the impact that replacing the large rocks would have on slope stability at the crossing.

4.3 Position of Alliance

Alliance submitted that following the identification of slope instability at the Bear River crossing in August 2003, a geotechnical assessment of the site was undertaken. Various options for slope stabilization were considered, including regrading, riprap, and gabion revetments combined with a lock block wall. Alliance selected the option of combined slope regrading and riprap armouring as it was deemed to be least intrusive from an environmental perspective. According to Alliance, a copy of the proposal for remediation work was provided to the Sieberts prior to commencing the work in October 2003 but the Sieberts were not consulted with regard to the alternative options as these designs were not considered to be viable. Alliance submitted design drawings and reports prepared by geotechnical and hydrotechnical consultants specifying that the riprap should be less than 600 mm in diameter and composed of hard, rounded rock. In one of

these reports, the hydrotechnical engineer recognized that locally sourced rock was composed of a sandstone with poor durability and to compensate for degradation of the rock size over time, included a provision for increasing the initial size of the riprap if such stone was used. Alliance submitted that the median diameter of the riprap used in construction was equal to the median diameter of the specified gradation despite an increase in the maximum size to 1000 mm.

It was submitted by Alliance that the large boulders and stilling basin at the outlet of the drainage pipe serve a dual purpose: to slow the speed of water discharged from the drainage pipe thereby preventing scour of the channel; and to prevent the speed of the river from eroding the bank below the pipe outlet. In Alliance's opinion, removal of the boulders from the stilling basin or replacement of the large riprap with smaller sized rock would leave the Bear River crossing with inadequate protection against river erosion. Alliance further submitted that intrusive stream work or excavation of the riprap revetment would disturb and potentially destabilize the currently stable slope and slow down the process of natural stream bank regeneration.

Alliance stated that monitoring of the Bear River is ongoing and that it will continue monitoring and conduct repairs to the crossing as necessary. During monitoring conducted in June 2006 and the site visit in June 2007, Alliance observed that there was good establishment of vegetation around and between the riprap. According to Alliance, over time the river will deposit fine grained material over the gravel and between the riprap and vegetation will continue to take hold creating a natural looking stream bank. Fencing along the stream bank to restrict elk access to the riprap could, in Alliance's opinion, exacerbate the problem of erosion at the river crossing.

4.4 Post Hearing Agreement

The Post Hearing Agreement states that Alliance will break up approximately ten large rocks at the base of the drainage culvert at the Bear River Crossing using electric or air powered jack hammers so that the sharp edges are removed from the boulders. The final rock size will not be smaller than the size required for it to function as rip rap. Alliance will make its best efforts to have this work completed by the end of August 2007.

The Post Hearing Agreement also stipulates that Alliance will replace the shrubs and trees that were planted by Alliance within the Bear River Crossing exclusion fence that had not survived the prolonged dry period. Alliance will determine the plant type and timing for planting based on recommendations obtained from a reclamation or greenhouse specialist and work would likely be completed this fall or next spring.

Views of the Board

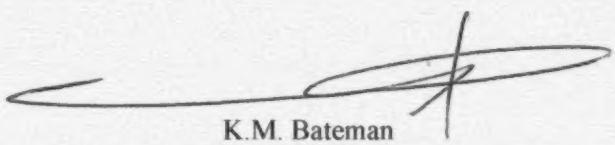
Through their negotiations, the parties have reached an agreement with respect to the remediation required at the Bear River Crossing; therefore, no Board determination is required with respect to this issue.

Chapter 5

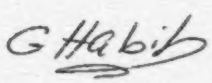
Disposition

The foregoing chapters constitute our Decisions and Reasons for Decision in respect of the land reclamation issues relating to the Alliance Pipeline on the Sieberts' Properties. The Board recognizes that following the conclusion of the oral hearing, the parties met and were able to reach an agreement on the steps to be taken by both parties with respect to the remedial measures to be implemented for the majority of issues in this matter. The Board commends the parties for working towards a negotiated resolution in this matter and encourages the parties to continue to engage in meaningful consultation and work collaboratively so that any future changes to the ROW take into account the needs of all concerned.

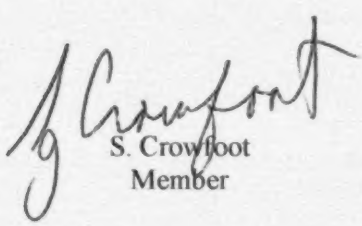
While the Board is ultimately available to determine unresolved matters, the Board notes that it does not expect to address issues that should be easily resolved through meaningful consultation between the pipeline company and the landowners, or in the alternative, through Appropriate Dispute Resolution (ADR), which the Board offers to all of its stakeholders.



K.M. Bateman
Presiding Member



G. Habib
Member



S. Crowfoot
Member

Calgary, Alberta
October 2007

Appendix I

Letter to Parties dated 20 March 2007 on Statutory Authority

National Energy Board

Office national de l'énergie

File: OF-Surv-Land-A159-21
20 March 2007

Mr. Lars H. Olthafer
Fraser Milner Casgrain LLP
30th Floor
237 - 4th Avenue SW
Calgary AB T2P 4X7
Facsimile 403-268-3100

Ms. Suzanne Thomas
Duncan & Craig LLP
2800 Scotia Place
10060 Jasper Avenue
Edmonton AB T5J 3V9
Facsimile 780-428-9683

Dear Mr. Olthafer and Ms. Thomas:

Alliance Pipeline Ltd.
Application to Review Board Decision dated 19 May 2006
Reclamation and Control of Noxious Weeds on Siebert Lands
Determination on Board's Statutory Authority to Issue Order

There has been a dispute between the Sieberts and Alliance Pipeline Ltd. (Alliance) regarding reclamation on the Sieberts' land for some time. On 19 May 2006 the National Energy Board issued a decision, indicating that it had received a complaint from the landowners approximately two and a half years earlier and ordering Alliance to file an inspection report and take specific actions for reclamation of the land due to the presence of scentless chamomile.

In a filing dated 20 June 2006, Alliance applied for a review of the Board's decision. The Board requested comments on whether Alliance had raised a doubt as to the correctness of the decision. After considering the comments the Board found, in a letter dated 15 September 2006, that the process leading to the decision of 19 May 2006 may not have been fair to Alliance, in that notice may not have been adequately provided to indicate that a decision of the Board was contemplated. The Board ordered that the decision would be reviewed and indicated that further procedural directions would be forthcoming.

The Board was then advised by counsel for both parties that the parties were attempting to reach an agreement without the assistance of the Board. As an agreement could not be reached, on 19 December 2006 the Board indicated that it had decided to conduct the review in two stages. The first stage was to deal with Alliance's questions regarding the Board's statutory authority to make its decision. The Board solicited written submissions on the following questions:

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Calgary, Alberta T2P 0X8

444, Septième Avenue S.-O.
Calgary (Alberta) T2P 0X8

Canada

Telephone/Téléphone : 403-292-4800
Facsimile/Télécopieur : 403-292-5503
http://www.neb-one.gc.ca
Telephone/Téléphone : 1-800-899-1265
Facsimile/Télécopieur : 1-877-288-8803

1. Does the Board have statutory authority to require Alliance to conduct reclamation activities on the Sieberts' property outside of the [right of way] or temporary workspace of Alliance?

2. If the answer to 1 is yes, do the compensation provisions set out in Part V of the *National Energy Board Act* limit the Board's authority to require Alliance to conduct reclamation activities on the Sieberts' property outside of the [right of way] or temporary workspace of Alliance?

3. Does the Board have statutory authority to allow the Sieberts to determine if a fence is required to deal with reclamation activities on the Sieberts' property outside of the [right of way] or temporary workspace of Alliance?

Alliance filed its submissions on 8 January 2007. The Sieberts' submissions followed on 29 January 2007 and Alliance filed its reply comments on 12 February 2007.

Parties Submissions

Alliance

Alliance argued that the Board exceeded its jurisdiction by requiring Alliance to conduct reclamation activities outside the right of way or temporary work space it had acquired. According to Alliance, the Board had no express or implied jurisdiction to determine issues of reclamation or other mitigation actions beyond the right of way and temporary work space[1]. Alliance relied in part on the fact that it does not have access rights to those lands outside of its right of way to undertake activities contemplated by the Board's decision. Alliance also suggested that, in order to have the access contemplated by the Board's decision, it would have had to demonstrate a basis for requiring such access or acquired the requisite approvals (for example, NEB certificate or CEAA requirements). Alliance reasoned that the Board does not have jurisdiction to compel a pipeline company to undertake any matter for which the company would not require an approval from the Board. In this regard, Alliance pointed to the fact that the Board was directing Alliance to undertake activities in areas that were outside the scope of the environmental assessment performed and considered by the Board as a responsible authority under the CEAA for the pipeline project.

Alliance argued that the jurisdiction to compel a pipeline company to undertake works or projects is limited to that which is expressly provided by the Act and that the powers outlined in sections 12, 13 and 15 of the Act were circumscribed by references to "lands" and "pipeline", which are defined terms.

1 Although parties referred to both right of way and temporary work space in their arguments, for ease of the discussion, the Board will refer to right of way only for the remainder of this decision. No distinction was drawn between the two types of land acquisitions; thus, where the Board discusses right of way, temporary work space was also considered.

Alliance argued that the Board's powers are limited to only what is rationally related to the purpose of the regulatory framework and pointed to the fact that the Board's main function in relation to pipelines is to ensure that a pipeline is in the public convenience and necessity having regard to the public interest. Alliance stated that the power to deal with lands outside of the right of way is not practically necessary for the Board to accomplish the objects intended to be secured by Parliament.

Alliance also suggested that the fact that the Act includes a scheme for the negotiation and arbitration for, among other things, damage suffered as a result of the operations of the company, suggests that the Board's jurisdiction to deal with off-right of way matters is limited.

In reply, Alliance noted that the Board only has jurisdiction over federal works or undertakings and argued that the area beyond the right of way is not an integral part of Alliance's federal undertaking. Alliance therefore argued that it was improper to assert that the Board has unconstrained jurisdiction over property. Alliance argued that areas that had not been taken up or used by the company were not part of the Alliance pipeline.

When examining the question of whether the Board's authority to require Alliance to conduct reclamation activities outside of the right of way is limited by the compensation provision set out in Part V of the Act, Alliance acknowledged that the compensation provisions would not limit the Board's authority if it was assumed that the Board had the requisite jurisdiction.

Finally, when addressing whether the Board has the statutory authority to allow the Sieberts to determine if a fence is required to deal with reclamation activities on the Sieberts' property outside the right of way, Alliance submitted that the Board's actions amounted to an improper delegation of the Board's fact-finding and decision-making functions to the Sieberts. Alliance noted that Parliament had expressly set out to whom a power may be delegated and noted that a quasi-judicial function is usually incapable of sub-delegation without express authority. It also pointed to the impracticality of an appeal or review of the delegated decision as further supporting its position.

In reply, Alliance submitted that the determination the Board delegated to the Sieberts in respect of the fence could not be characterized as merely administrative in nature, however, even if it was assumed to be, the Board lacked the authority to delegate administrative decisions, as Alliance would be left without any avenue to appeal or request a review of the determination.

Sieberts

The Sieberts submitted that the Board has the express jurisdiction to deal with the proliferation of weeds beyond the right of way by virtue of section 12 of the Act. They noted that Alliance has a positive obligation by virtue of section 75 to do as little damage as possible in the exercise of its powers and that the Board had the ability to determine whether that obligation had been met. The Sieberts further submitted that section 13 of the Act permitted the Board to issue an order requiring Alliance to do any act, matter or thing required under the Act.

The Sieberts argued that, even if the Board was of the view that it did not have express statutory authority to deal with the matter, the Board has the implicit power to address the matter by virtue of jurisdiction by necessary implication.

The Sieberts submitted that the compensation provisions set out in Part V of the Act do not limit the Board's authority, claiming that the determination of whether Alliance had met its obligations under the Act and a Board direction in that regard was an issue separate and apart from any compensation that the Sieberts may be entitled to under Part V.

In terms of whether the Board had the authority to allow the Sieberts to determine if a fence was required, the Sieberts suggested that the Board had directed that the Sieberts assist in the implementation of the plan by moving the elk and constructing a fence if required. The Sieberts noted that administrative bodies have often been found to have an implied authority to delegate powers that are purely administrative in nature and argued that the Board was merely requesting the Sieberts to assist in the administrative aspects of implementing its decisions.

Views of the Board

The Board agrees with the parties that its jurisdiction to issue the orders it did must be found either explicitly in the Act or by necessary implication.

In examining the questions regarding the Board's jurisdiction, the Board noted particularly, the words of the Supreme Court of Canada in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* regarding statutory interpretation:

> the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature.[2]

The Court in *ATCO* was building on a previous Supreme Court decision which gives assistance on considerations courts (and in this case, the Board) should have when examining what powers a tribunal has.

> The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must avoid sterilizing these powers through overly technical interpretations of enabling statutes.[3]

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2 *ATCO*, [2006] 1 S.C.R. 140, at para 51.
3 *Bell Canada v. Canada (The Canadian Radio-Television and Telecommunications Communications)*, [1989] 1 S.C.R. 1722 at para 50.

The Board is also guided by Driedger's approach to statutory interpretation which has been adopted by the Court and the Board in many decisions:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[4]

The Board was therefore guided by the overall scheme and object of the *National Energy Board Act* in considering whether it has the jurisdiction to make the orders that it did. The Board examined and considered the Act as a whole. Contrary to Alliance's assertion that the Board's main function in relation to pipelines is ensuring that the pipelines is in the public convenience and necessity, the Board is of the view that its jurisdiction and authority is much broader. As stated on the Board's web site:

> The Board's corporate purpose is to promote safety and security, environmental protection and efficient energy infrastructure and markets in the Canadian public interest within the mandate set by Parliament in the regulation of pipelines, energy development and trade. This principle guides the Board in carrying out and interpreting its regulatory responsibilities.[5]

The Board also had regard to the various parts and sections of the Act. The Board notes the broad advisory and study provisions in Part II. Part III, which deals with the construction and operation of pipelines, refers not only to the issuance of certificates of public convenience and necessity, but also to, *inter alia*, the rights of owners of lands who have been affected by the proposed construction of a pipeline, the safety of the public and the protection of property and the environment. The Board has broad powers pursuant to Part IV of the act to make orders with respect to all matters relating to traffic, tolls and tariffs on a pipeline.[6]

Having laid out its approach to examining the questions asked, the Board now turns to the specific determinations to be made.

> ***1. Does the Board have statutory authority to require Alliance to conduct reclamation activities on the Sieberts' property outside of the [right of way] or temporary workspace of Alliance?***

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4 Driedger, E. A. *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at p. 87.
5 National Energy Board, online: http://www.neb-one.gc.ca/AboutUs/history_e.htm#what.
6 See for example *TransCanada Pipelines Ltd.* v. *Canada (National Energy Board)*, [1986] F.C.J. No. 733] (C.A.); *TransMountain Pipeline Co.* v. *Canada (National Energy Board)*, [1979] F.C.J. No. 23 (C.A.); *TransCanada Pipelines Ltd.* v. *Canada (National Energy Board)*, [2004] F.C.J. No. 654 (C.A.); *Flint Hills Resources* v. *Canada (National Energy Board)*, [2006] F.C.J. No. 1489 (C.A.); *Sumas Energy 2 Inc.* v. *Canada (National Energy Board)*, [2005] F.C.J. No. 1895 (C.A.)

When considering the first question, the Board first examined section 75 of the Act, which states:

> 75. A company shall, in the exercise of the powers granted by this Act or a Special Act, do as little damage as possible, and shall make full compensation in the manner provided in this Act and in a Special Act, to all persons interested, for all damage sustained by them by reason of the exercise of those powers.

While Alliance based much of its argument on the definitions of "pipeline" and "land" as determining the Board's jurisdiction in this matter, the Board notes that neither of these words appear in this section. Rather, the wording is very broad in requiring the company to do as little damage as possible.

The Board has the jurisdiction in sections 12[7] and 13[8] to enquire into any matter where it appears to the Board that any person has failed to do any act required to be done by the Act or has done something in contravention of the Act, and to order and require any person to do any matter as the person may be required to do under the Act or forbid the doing or continuing of anything that is contrary to the Act. In the Board's view, this must include ordering a company to remedy the damage that it did in the construction, operation and maintenance of its pipeline.

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7 **12**. (1) The Board has full and exclusive jurisdiction to inquire into, hear and determine any matter

(*a*) where it appears to the Board that any person has failed to do any act, matter or thing required to be done by this Act or by any regulation, certificate, licence or permit, or any order or direction made by the Board, or that any person has done or is doing any act, matter or thing contrary to or in contravention of this Act, or any such regulation, certificate, licence, permit, order or direction; or

(*b*) where it appears to the Board that the circumstances may require the Board, in the public interest, to make any order or give any direction, leave, sanction or approval that by law it is authorized to make or give, or with respect to any matter, act or thing that by this Act or any such regulation, certificate, licence, permit, order or direction is prohibited, sanctioned or required to be done.

(2) For the purposes of this Act, the Board has full jurisdiction to hear and determine all matters, whether of law or of fact. ....

8 **13.** The Board may

(*a*) order and require any person to do, forthwith, or within or at any specified time and in any manner prescribed by the Board, any act, matter or thing that such person is or may be required to do under this Act, or any regulation, certificate, licence or permit, or any order or direction made or given under this Act; and

(*b*) forbid the doing or continuing of any act, matter or thing that is contrary to this Act or any such regulation, certificate, licence, permit, order or direction.

The Board's power to order a company to perform reclamation cannot, in the Board's opinion, be limited to the right of way. While Parliament could have limited the operation of section 75 to the lands the pipeline acquired, it did not do so. Further, in the Board's view, it is not logical that a pipeline can damage a landowner's lands along the right of way and be forced to remedy the ill, but if it does damage to places where it was not supposed to enter or touch, the Board cannot order remediation. The landowner would then be in the position of having to pursue a civil action, or settle for damages under the arbitration provisions of the Act. Such limitations on the Board's powers, when a pipeline company is acting outside of its powers and beyond the parameters of its authorized activities, do not seem consistent with the provisions noted above.

To take Alliance's view to its logical conclusion, if a pipeline had a spill or rupture, which affected more than the lands on the right of way, the Board could not order remediation of those lands. Such cannot have been the intent of Parliament when it gave the Board oversight of pipelines.

However, the Board's powers to make orders off right of way cannot be unlimited; it must relate to the activities of the pipeline. Thus, the Board has the authority to order reclamation off right of way, so long as it first finds that the damage off right of way was caused by the pipeline.

Alliance has argued that the Board lacks the jurisdiction to grant an off right of way order because it presumes that Alliance has the right to access the lands, which it claims it does not have. This would mean that Alliance would be required to obtain those rights, possibly by a right of entry order and would have the onus of demonstrating the basis for requiring such access.

A right of entry order is required only if access to the land cannot be agreed upon with the landowner. Given that the Sieberts want this reclamation done, it would seem unlikely that they would object to Alliance entering the lands. If they did, Alliance could notify the Board and the Board could consider modifying its order or examine what other options might be available. The Board does not believe that the question of accessing the lands can determine the Board's jurisdiction to make certain orders, particularly when there is no reason to believe the company will have difficulty accessing the lands.

Alliance also argued that the activities the Board directed Alliance to undertake were outside of the scope of the environmental assessment conducted pursuant to the *Canadian Environmental Assessment Act* (CEAA) when approval for the pipeline was granted. Presumably, the activity was not specifically part of the scope of the assessment, as it was not supposed to have occurred. The fact that damage occurs beyond the scope of the environmental assessment cannot be determinative of the Board's jurisdiction to order reclamation under the *National Energy Board Act*. Further, it would seem to the Board that it would be inconsistent with the purpose of CEAA to use a lack of a CEAA environmental assessment as a means to avoid reclamation of environmental damage.

Thus, in answer to the first question, the Board is of the view that it had the jurisdiction to require Alliance to conduct reclamation activities on the Sieberts' property outside of the right of way or temporary workspace of Alliance, so long as the reclamation is for damage caused by Alliance.

As the Board answered the first question affirmatively, it must then turn to examine the second question.

> ***2. If the answer to 1 is yes, do the compensation provisions set out in Part V of the National Energy Board Act limit the Board's authority to require Alliance to conduct reclamation activities on the Sieberts' property outside of the [right of way] or temporary workspace of Alliance?***

The second question posed was whether the compensation provisions set out in Part V of the Act limit the Board's authority to order reclamation. Neither party argued that it did. To suggest this, would result in an inconsistent interpretation under the Act. Clearly, the Board has jurisdiction to order reclamation on right of way, and this is not affected by the existence of the compensation provisions. Thus, these same provisions cannot affect the Board's jurisdiction to make orders off right of way.

The Board finds that the compensation provisions do not affect the Board's authority.

> ***3. Does the Board have statutory authority to allow the Sieberts to determine if a fence is required to deal with reclamation activities on the Sieberts' property outside of the [right of way] or temporary workspace of Alliance?***

The Board's final question related to the authority of the Board to allow the Sieberts to determine if a fence is required.

The Board is of the view that it is not necessary to make a decision on this question. The Board has already determined that the decision will be reviewed. Given that a subsequent proceeding will be held to examine the matters of damage and reclamation, the Board is of the view that it would be most appropriate to consider the question of whether a fence is required, or the conditions under which it might be required, at that same time.

Further Procedure

The Board's decision of 19 May 2006 is voided. The Board is of the view that the best and most expeditious way of resolving this matter may be to hold an oral hearing during the second or third week of June 2007 to consider the issues:

- What are the reclamation issues in dispute?
- What is the cause of the damage, including the introduction and propagation of scentless chamomile?
- What remediation needs to be done and by whom?

However, before making a decision to set this matter down, the Board wishes to hear from both parties. Therefore, Board counsel, Ms. Margery Fowke and Ms. Kristen Lozynsky, will be in contact with you to discuss process matters.

Yours truly,

Michel L. Mantha
Secretary

c.c. Mr. E.J. Altenhof - Alliance Pipeline Ltd., facsimile 403-266-4495
Robert Siebert and Donna Siebert, Box 87, LaGlace AB T0H 2J0